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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 521

MORRIS SHURIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 309–314) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered November 10, 1947 (R. 315). On December 8, 1947, the Chief Justice extended the time for filing a petition for a writ of certiorari through January 9, 1948 (R. 318). The petition was filed January 9, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether material statements made by petitioner to his local draft board were false.

2. Whether the offense of filing a false report with the draft board was an offense committed in more than one district, because the report was mailed from New York to the draft board in North Carolina.

3. Whether it was error to admit evidence of gambling by petitioner on the issue of credibility and, if so, whether the error was harmless.

STATUTE INVOLVED

Section 11 of the Selective Training and Service Act, 54 Stat. 894, 50 U. S. C. App. 311, provides:

> Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall know-

ingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or non-liability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act un-

less such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act.

STATEMENT

Petitioner was indicted in the United States District Court for the Middle District of North Carolina, in three counts charging evasion of military service by making three different false statements to his local board as to his liability for military service (R. 1–3). He was convicted on the first count and was sentenced to imprisonment for a term of eighteen months (R. 198). Upon appeal to the circuit court of appeals, the judgment was affirmed (R. 315).

The evidence in support of the judgment of conviction may be briefly summarized as follows:

On October 16, 1940, petitioner registered for the draft with Local Board No. 2, Greensboro, North Carolina (R. 13).[1] On May 22, 1941, he filed his questionnaire in which he stated his occupation as that of a law clerk (R. 14). After having been deferred on occupational and dependency grounds, petitioner was reclassified 1–A and on January 8, 1944, he was issued an order to

[1] At that time petitioner lived and worked in Greensboro, North Carolina (R. 13). He later moved to New York (R. 15).

report for induction on January 19, 1944 (R. 16–17). On January 10, 1944, the local board received a telegram from petitioner, which, together with Form 42–A (*infra*), is the basis for the charge in count 1 of the indictment. The telegram stated (R. 17):

> Received induction orders today for January 19th, 1944. Am in complete surprise at not being reclassified from 3A which I received on April 14, 1943 to 1A so that may have the civil right to appeal local board here cannot figure it out unless some mistake has been made. I would certainly be in receipt of any mail had you sent me a reclassification and would have appealed directly to you without further difficulty as I am now president of a defense plant making aeroplane parts with orders from the Army and Navy. Form 42A will follow. Please wire collect your decision.

On January 13, 1944 the Form 42–A, to which reference was made in the telegram, was filed by petitioner (R. 18). Petitioner's statements on the Form 42–A, as described at the trial, were as follows (R. 214–215):

* * * * *

> A. Name of Registrant: Morris Shurin.
> Selective Service Order No.: 1673; Age: 31.
> Local Board: No. 2, Guilford County, Greensboro (city), N. C. (state).
> Title of present job: Pres. & Manager of Entire business.

Describe duties actually performed: Placing all sub-contracts. Buying all tools. Running shop. Inspecting all aircraft work for our Army and Navy planes. Consult on all our work for Ranger aircooled engines. Our contracts total about $600,000 Dollars. In the last 60 days, we have shipped $135,000.

Q. What is the date of that?

A. This was received at the Local Board on January 10, 1944.

On the back of the form they ask the question:

Name of Company: Hudson Aircraft Products Co., 318 East 39th Street, New York City.

Description of the activities of this company: Manufacture of 21 different parts for Army and Navy. Plans such as bolts, damper rings, and crankshafts for Ranger Eng. Trainer and Fighter planes.

State specifically what proportion of your products currently produced are: (a) for use in the war effort: 100%. (b) for civilian use: None.

Is expansion or further conversion contemplated in war production? Yes.

Number of employees now: 84.

Q. Read the last paragraph.

A. The last question that applied to him was the number of employees now, and he states 84.

Q. Wasn't that executed by Morris Shurin?

A. He says: "This form was completed

at the plant or office of the company located at Hudson Aircraft Prod. Co., 318 E. 39th Street, NYC, and all correspondence relative to this affidavit should be so addressed.

"I, Morris Shurin, do solemnly swear (or affirm) that I am President and Manager of the above named company, and that the foregoing statements are true to the best of my knowledge and belief." It was signed Morris Shurin and "subscribed and sworn to before me this 10th day of January 1944."

On the basis of the representations made to the local board in the telegram and the Form 42–A, the board reclassified petitioner on January 24, 1944, into II–A, as one engaged in an essential occupation (R. 19). Thereafter, on the basis of similar representations (R. 22, 23, 25) petitioner retained a deferred classification on occupational grounds until September 24, 1945, when he was deferred as a person over 30 years of age (R. 26).

Petitioner's representations concerning his occupational activities were based primarily on his relationships with the Ranger Aircraft Company and the Olderman Brass Foundry and the Olderman Machine and Tool Company. It was undisputed that beginning in 1943 petitioner obtained various subcontracts from Ranger for the manufacture of aircraft parts (see R. 102–107) while using the trade name Hudson Aircraft Products Company, which had been registered in

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his wife's name (see R. 258). The subcontracts were obtained on the basis of petitioner's arrangements with the Olderman firms. (See R. 96–99.)

The Olderman firms had been engaged in the manufacture of brass equipment and petitioner had worked for them as a tool stock boy in the latter part of 1942 (R. 225, 226–227). In 1943, petitioner and the Olderman firms entered into an arrangement whereby petitioner would obtain subcontracts from Ranger and the Olderman firms would manufacture the products. (See R. 228.) Petitioner had no office or plant facilities, so he was permitted to use the Olderman's telephone facilities and their office. Later he was permitted to place a sign with his trade name over the door to the Olderman plant so that trucks from Ranger would know where to deliver the raw materials (R. 228).

Under the arrangement,[2] Ranger supplied the raw materials to Olderman (R. 228) and picked up the finished product (R. 229). Petitioner paid Olderman for the products they manufactured (R. 229). Petitioner had no access to the Olderman plant where the manufacturing was done, except after the process was completed and the goods were to be inspected (R. 228). He did not supervise work done in the plant under the Ranger sub-contracts (R. 229); the finished products were inspected by a Navy inspector (R.

[2] The total business between petitioner and the Oldermans amounted to sixty or seventy thousand dollars (R. 233).

230). Petitioner had no employees or payroll of his own (R. 238). He did not furnish Olderman with raw materials,[3] tools, machinery, or investment capital (R. 236, 241). One official of the Olderman plant testified that petitioner came to the Olderman plant about once each week and never remained for more than half an hour (R. 241).

In a statement to an F. B. I. agent petitioner admitted that he had no manufacturing facilities of his own and that his modus operandi was to subcontract his work to manufacturers who did have facilities; that Hudson Aircraft Products Company was a trade name and he was its sole owner; and that he had no employees (R. 252).

ARGUMENT

1. It is plain from the evidence at the trial that petitioner was a contract agent who obtained subcontracts from a prime contractor and turned them over to others who had manufacturing facilities for actual production of the products. Indeed, he does not deny this. Instead his only claim seems to be that in addition to getting the contracts he furnished the manufacturer services as an expediter; he furnished scarce raw materials; and he furnished necessary cash advancements (see R. 108–109). But even if his testimony is assumed to be true, the statements which he made to the local board were false. Petitioner

[3] Ranger furnished the raw materials (R. 228, 235–236).

did not tell the local board that he was a contract agent who furnished various services to manufacturers. On the contrary, he told the board that he was the President and Manager of a firm that manufactured 21 different parts for Army and Navy planes; that his duties included "buying all tools," running the shop, and inspecting all the "aircraft work for our Army and Navy planes"; and that he had 84 employees (R. 17–19). Petitioner had no employees; he did not buy tools; he did not have a plant in which he manufactured plane parts; and he did not "run the shop" for he was not even permitted in the Olderman's shop.

The short of the matter is that the local board was led to believe that petitioner was an essential producer of plane parts, while in fact this work was performed by the Olderman firm. The board was never informed of petitioner's true function. If it had been, the board might not have been willing to grant him an occupational deferment.

Petitioner's effort to escape the impact of the plain facts by urging (Pet. 3–4, 9–10, 23–26) that in its broadest sense "manufacture" includes activities such as his is beside the point. Petitioner made specific representations to the local board as to his activities, and these were undeniably false, regardless of whether petitioner was or was not a manufacturer.

2. Petitioner also contends (Pet. 26–32) that the district court erred in not transferring his

case for trial to the District Court for the Southern District of New York, where he then resided. His reliance is on Rule 21 (b) of the Federal Rules of Criminal Procedure, which provides:

> OFFENSE COMMITTED IN TWO OR MORE DISTRICTS OR DIVISIONS. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

The rule permits a transfer of the case for trial where it appears from the indictment or a bill of particulars that the offense was committed in more than one district, and it provides that the transfer shall be "to another district or division in which the commission of the offense is charged." In this case count 1 (R. 1–2) of the indictment charges that "in the Middle District of North Carolina" the defendant evaded military service in that he made false statements to the board in an occupational classification affidavit. There was no bill of particulars.[4] It does not

[4] If, notwithstanding the allegation of the indictment, petitioner believed that the offense was committed in New York, too, he could have ascertained the facts bearing on this question by moving for a bill of particulars, and then he would

appear from the indictment that the offense was committed in any district other than the district in which petitioner was tried, or that there is any other district to which the case could be transferred. It is plain, therefore, that Rule 21 (b) did not authorize the transfer which petitioner so belatedly sought. (See R. 312.)

In addition to this factor, petitioner also has failed to establish that the offense of evading military service by filing a false statement with the local board is committed in any district other than that where the local board is situated. We agree with the view of the court below (R. 312–313) that the offense occurred when the statements were filed and this took place only in the Middle District of North Carolina. Contrary to petitioner's assumption, the Constitution does not give a defendant a right to be tried where he lives;[5] the right is to be tried in the state and district where the crime occurred. Petitioner enjoyed that right in this case.

3. Petitioner's third contention (Pet. 32–34) is that it was error to permit the Government to show in cross-examining him that he once attended a dinner party at which eight or ten

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have been in a position to move for a transfer of the case and the court would have had a basis for knowing whether the offense was committed in more than one district.

[5] The right to subpoena witnesses (Rule 17 (a) (e)) and the right to obtain depositions (Rule 15) fully enabled petitioner to obtain witnesses from New York, where he lived, if he wanted their testimony.

friends, including one George Raft, were present, and at which the guests engaged in a gambling game for about half an hour (R. 148–150). The evidence was admitted solely on the issue of petitioner's credibility and the jury was so instructed (R. 149, 193).

We agree with petitioner and with the view expressed in *Campion* v. *Brooks Transportation Co.*, 135 F. (2d) 652, by Chief Justice Vinson speaking for the Court of Appeals for the District of Columbia, that evidence of occasional participation in a game of chance is not probative on the issue of the witness' credibility. But the error is not one, we submit, which entitles petitioner to a new trial.

The trial lasted five days and the incident in question consumed no more than a minute or two. Certainly there was nothing prejudicial in the jury's knowing that petitioner attended a dinner party at which a movie actor was present. And it may be seriously doubted that in these times when even churches conduct bingo games and other such games of chance as fund-raising devices that the jury would be prejudiced against petitioner because he once gambled for half an hour. Indeed, the fact that the jury acquitted petitioner on the second and third counts of the indictment which were supported by the same evidence which supported the first count suggests that, instead of being prejudiced against petitioner, the jury tempered justice with mercy.

This is not a case in which the evidence was close and the scales may have been tipped against the defendant by the erroneous evidence. Here, the basic facts are undisputed. The only question was whether the false statements were made for the purpose of evading military service. The inference against petitioner is so compelling that it is well-nigh impossible to believe that if the disputed evidence had not been received, the verdict would have been any different.

4. There is no merit to petitioner's argument (Pet. 34–37) that he was prejudiced by an asserted suggestion from the prosecuting attorney that petitioner had had meritricious relations with a young lady whom he later married. There was testimony at the trial that petitioner, while married to his first wife, had established the Hudson firm and filed a trade-name certificate in the name of one Irene Lindenauer (R. 263–264). In the course of cross-examination in which petitioner explained that he had been divorced by his first wife and had married his business associate, the following occurred (R. 258):

> Q. When the Hudson Aircraft Company was formed, who owned it?
>
> A. Irene Lindenaur.
>
> Q. She is your present wife?
>
> A. That is right.
>
> Q. I ask you if the divorce action brought by your first wife was not based on your relations with your present wife?
>
> Defendant objects. Sustained.

A. Absolutely not.

Q. You did not have any connection with Hudson Aircraft until you married Irene?

A. That is not true.

Q. How long had you and she been engaged under the trade name of Hudson Aircraft Products Company until you married her?

A. I believe I went with her when she filed a certificate in 1943.

Q. That was before you got your divorce?

A. That is right.

Q. You and she were associating a year before you were divorced?

Mr. JONES: What do you mean by associating?

Mr. MCNEILL: He said he went there for the purpose of filing a certificate.

Defendant objects. Overruled. Exception.

Q. Is that right?

A. Yes, sir.

Assuming that the question whether petitioner's divorce resulted from his relations with his second wife was improper, the court did the only thing it could do by sustaining petitioner's objection to it. By answering the question even though he was not required to and denying that the divorce was attributable to the ground suggested, petitioner removed whatever sting there could have been in it. Similarly, the suggestion that the prosecuting attorney's use of the word "associating" carried the innuendo of illicit as-

sociation is rebutted by the prosecutor's statement at the time showing that he referred to business associations. It requires considerable reading between the lines to spell out from this that the jury were told that petitioner and his second wife had immoral relations before their marriage.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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FEBRUARY 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948